

# The Isle of Man Land Registry

**Application Number:** 200900771

**Applicants:** Adrian Corkill and Alison May Fox

**Title Applied For:** Absolute together with Prescriptive Right of Access over Adjoining Lands

**Advocate:** Simcocks

**Objector to Prescriptive Right:** Vivian Alexander Liff  
Personal representative of George Stuart (deceased)

**Solicitor:** Stuart Smalley & Co.

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## Decision re. Prescriptive Right Application

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1. The Applicants are represented by Mr. Anderson, Solicitor of Simcocks, and the Objector by Ms. Riley, Solicitor of Stuart Smalley & Co.
2. In their Application for first registration of the premises Creg Cottage, Bradda East, Port Erin, IM9 6QA, dated 28<sup>th</sup> May 2009, the Applicants included in Appendix F the following appurtenance:-
3. *"The easement referred to in the Affidavit dated 10<sup>th</sup> April 1990 and sworn by Michael John Davies and Katrina Davies in respect of the right of access over the adjoining property then known as Bracken (now called and known as Craig-y-Nos) with or without ladders and equipment for the purpose of repair to Creg Cottage. And referred to the subsequent Affidavits sworn to date and the right being shown as coloured pink on the Affidavit sworn by Adrian Corkill and dated the 9<sup>th</sup> day of April 2009."*
4. Clearly this is an Application to register a prescriptive right for purposes of repair to Creg Cottage. There is no reference to *"A right of entry to repair the fence on the boundary"* referred to in the Objector's skeleton argument.

5. The deed inducing first registration was a Deed of Conveyance dated 10<sup>th</sup> April 2009 made between Adrian Corkill of the one part and Adrian Corkill and Alison Mary Fox (the Applicants) of the other part (deed ref: 2009/01692). I note that there is no specific reference in this deed to the claimed prescriptive right. In support of their application to register the claimed prescriptive right, the Applicants referred to a number of Statutory Declarations, namely:-
- (i) Declaration of Michael John Davies and Katrina Davies dated 10<sup>th</sup> April 1990 (deed ref: 1990/2333);
  - (ii) Declaration of Robert Kay and Celia Margaret Kay dated 16<sup>th</sup> April 1991 (deed ref: 1991/5517);
  - (iii) Declaration of Clare Veronica Brandshaw dated 13<sup>th</sup> September 1996 (deed ref: 1996/5423); and
  - (iv) Declaration of Adrian Corkill dated 9<sup>th</sup> April 2009 (deed ref: 2009/01691).

Subsequently a further Declaration of Adrian Corkill dated 19<sup>th</sup> February 2010 was filed.

6. In the case of the first four Declarations, the wording, with the exception of changing from plural to singular and a later reference to Craig-y-Nos, of the main part of the Declaration is almost identical in each case. The first Declaration reads. *"Ever since the date of purchase of the property described in the said Deed of Conveyance up to the date hereof I have exercised a right of access over the adjoining premises known as The Bracken with or without ladders and equipment for the purpose of repair and maintenance of the Creg Cottage property freely and openly and without any claim challenge or demand having been made by any person or persons whomsoever"*.
7. The Prescription Act 1832 is an Act of the Westminster Parliament and is not applicable in the Isle of Man. The relevant statutory provision in the Isle of Man is Section 34 of the Limitation Act 1984 which reads:-

- "(1) Any right over land which has been enjoyed as of right without interruption for the appropriate period shall be deemed absolute and indefeasible, unless it is shown that it was enjoyed by virtue of an express agreement or consent in writing.*
- (2) In subsection (1) 'the appropriate period' means*
  - (a) in relation to an easement, 21 years;"*

8. The Applicants have referred to the definition of a prescriptive easement as set out by Deputy Deemster Williamson in the case of Kelly -v- Bennett SJ 2000/171, paragraph 16:-

*"The text books, Cheshire, Megarry and Wade, and the case law, for example in re Ellenborough Park 1956 CH. 131 at page 140, state that there are four essential characteristics of an easement. "(1) there must be a dominant and a servient tenement; (2) an easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefits; (3) the dominant and servient owners must be different persons; (4) the right claimed must be capable of forming the subject matter of a grant."*

9. This is, of course, perfectly correct but what is not referred to in that specific incidence is what must also be a basic requirement of a prescriptive right and that is that any claimant by prescription must show that he or she has used or enjoyed the easement or profit "as of right". The Courts in the United Kingdom have clearly stated that the user must have been *nec vi, nec clam and nec precario* (without force, without secrecy and without permission). It is also clear that a claimant to a prescriptive easement cannot succeed in establishing user "as of right" if the user has been made under an agreement with or licence from the servient owner. This is clearly set out in Section 34(1) of the Limitation Act 1984 as already referred to.

10. Notice of the Application for the registration of the claimed prescriptive right was given to the Objector by letter dated 23<sup>rd</sup> July 2009 from me to the Objector.

11. By letter dated 5<sup>th</sup> August 2009, Ms. Riley (Stuart Smalley & Co. Solicitors) acting on behalf of the Objector, indicated that he objected to the Application. Subsequently by letter dated 27<sup>th</sup> January 2010, Ms. Riley set out the grounds of the objection which are:-

*"That agreement to access was obtained and not exercised as of right. The 21 years required to establish such an easement has not been met."*

Ms. Riley further went on to say in that letter *"At all times when neighbours requested access to Craig-y-Nos, it was given by the express permission of the owners or Craig-y-Nos (formerly The Bracken)."*

12. In support of the Objector's case, a number of Statutory Declarations have been filed.

13. By Statutory Declaration dated 13<sup>th</sup> August 2009, Jack Dearden Whittaker stated that he purchased The Bracken (now known as Craig-y-Nos) on 31<sup>st</sup> August 1971. Creg Cottage (The Applicants' premises) was at that time owned by a Mrs. Boot. He stated (paragraph 3) "*At no time during my ownership did any person connected with Creg Cottage come upon my land to carry out repairs with or without ladders or seek my permission to do so.*"
14. By Statutory Declaration dated 14<sup>th</sup> August 2009 the Objector stated (paragraph 1) "*By a deed of conveyance dated 21<sup>st</sup> October 1981 between (1) Jack Dearden Whittaker and (2) George Stuart ("GS"), GS purchased the freehold property described therein and known as "the Bracken" and now known as Craig-y-Nos, Bradda Head, Port Erin, Isle of Man ("the Property").*"
15. The Objector states that he lived at the property from October 1981 to 5<sup>th</sup> August 2009 and that GS lived there from January 1982 until his death on 6<sup>th</sup> October 2007. The Objector was appointed the Executor of the estate of GS. He clearly states (paragraph 11) by reference to a Draft Abstract of title of Creg Cottage, Bradda, Port Erin (exhibit marked VL4) which includes reference to the Applicants that "*The subsequent owners of Creg Cottage [I assume that he is referring here to all owners after a Mr. & Mrs. Rimmington]... also sought access to the Property to enable them to repair the western elevation of Creg Cottage and have always done so after having obtained the express consent of GS or me and we had no difficulties in coming to an amicable agreement for such licence. In some instances Ronald Broadbent carried out the work and was paid by GS who recouped the expenses from the said owners.*" He specifically refers (paragraph 8) to Mr. & Mrs. Rimmington seeking permission for access and similarly also Katrina Davies (paragraph 10).
16. Ronald Frederick Broadbent by Statutory Declaration dated 14<sup>th</sup> August 2009 states that he worked for GS and the Objector "*in the repair and maintenance of Craig-y-Nos...*" (Paragraph 1) He confirms having carried out work to the eastern elevation of Creg Cottage at the request of GS. "*I was paid by GS for those works who I understood recouped these expenses from the owners of Creg Cottage.*" [Mr. & Mrs. Rimmington and Mr. & Mrs. Davies] (paragraph 2).
17. Katrina Davies by Statutory Declaration dated 19<sup>th</sup> August 2009 in referring to the earlier Statutory Declaration of her former husband Michael John Davies and herself

dated 10<sup>th</sup> April 1990 stated (paragraph 4) "*We did not have a "right" to enter upon Craig y Nos, and relied upon the consent of GS and/or VL. The purchasers of the Property, Robert Kay and Celia Kay, had wanted some evidence in writing as comfort that they would not have problems in access for repair and maintenance of the gable end and chimney. I stated that they would not have a problem as I had always asked the permission of GS and VL and this was always granted. At the time, no reference was made to the requirement of consent.*" She further states (paragraph 6) "*My ex husband and I always had a very good relationship with GS and VL [Vivian Alexander Liff]. On that basis we always sought their permission to enter onto their land and did not go on without their permission. We never assumed that we had any right to go on their land without their express permission.*"

18. The requirements for a prescriptive easement to be established as already referred to (see paragraph 8) are:-
  1. There must be a dominant and a servient tenement. Clearly this requirement has been met in that the Applicants' promised Creg Cottage would be the dominant tenement and Craig-y-Nos would be the servient tenement.
  2. An easement must accommodate the dominant tenement and clearly in this case it would.
  3. The dominant and servient premises must be owned by different persons. Again, this would be the case here.
  4. The right claimed must be capable of forming the subject matter of a grant. I am satisfied that the Application would satisfy this requirement.
19. Finally there is the statutory requirement under the Limitation Act 1984 that the claimed right "*shall be deemed absolute and indefeasible, unless it is shown that it was enjoyed by virtue of an express agreement or consent in writing.*"
20. I am satisfied on the evidence as presented by the Objector that the access across Craig-y-Nos (previously "The Bracken") for repair and maintenance by all previous owners prior to the Applicants was with the consent of the owner of Craig-Y-Nos.
21. In his Statutory Declaration dated 19<sup>th</sup> February 2010, Adrian Corkill (the first named Applicant) refers to access on at least fifteen occasions for purposes of repairs and maintenance without permission from either the late George Stuart or the Objector

(paragraphs 9.1.2 and 9.1.4). Of course Mr. Corkill only purchased Creg Cottage on 16<sup>th</sup> September 1996 and as such his claimed use without permission is still well short of the statutory "appropriate period" of 21 years under Section 34(1) of the Limitation Act 1984.

22. Accordingly I order that the application for the registration of the prescriptive right by the Applicants is rejected.

Dated: 16<sup>th</sup> June 2010

G. Andrew Carnson, LL.B., M.Sc.  
**Assistant Chief Registrar**  
**Legal Officer (Land)**